No. 11820.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TAVARES CONSTRUCTION COMPANY, INC., a corporation, CONCRETE SHIP CONSTRUCTORS, a joint venture, STROUD-SEABROOK, a copartnership, LLOYD S. STROUD, R. S. SEABROOK, C. M. ELLIOTT, CARLOS TAVARES, HENRY M. PAGE and DON F. GATES,

Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA,

Appellee and Cross-Appellant.

BRIEF OF APPELLANTS.

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BRIEF OF APPELLANTS.

Jurisdictional Statement.

This is an appeal by certain defendants from those portions of the final judgment entered on June 6, 1947, by the District Court of the United States for the Southern District of California, Southern Division, in an action in eminent domain, adjudicating issues between the plaintiff and said defendants and from the order denying the motion of said defendants for a new trial entered in this action on July 29, 1947.

The action was brought by the Appellee at the request of the United States Maritime Commission under the authority of and pursuant to the provisions of the Act of Congress approved August 25, 1941 (Public Law No. 247—77th Congress), the Act of Congress approved March 5, 1942 (Public Law No. 474—77th Congress), the Merchant Marine Act of 1936, as amended, the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U. S. C., Sec. 257, 258), the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C., Sec. 258a), the Act of Congress approved March 27, 1942 (Public Law No. 507—77th Congress), being the Second War Powers Act of 1942 (50 U. S. C. Append., Sec. 632), and Acts amendatory thereof and supplementary thereto, to acquire property for the construction of facilities to be used in the construction and repair of ships and the operation of such facilities. [T. pp. 6 and 251.]

This appeal from the final judgment and from the denial of the defendant's motion for a new trial is taken pursuant to the provisions of 28 U. S. C. A., Sec. 225, which provides that:

> "(a) The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal or writ of error, final decisions—
>
> First. In the District Courts, in all cases, save where a direct review of the decision may be had in the Supreme Court under Sec. 345 of this title"

Statement of the Case.

The appellants are members of the joint venture known as Concrete Ship Constructors which was formed for the purpose of constructing concrete barges for the United States Maritime Commission. On November 27, 1941 this joint venture entered into a contract [T. p. 97] with the Maritime Commission wherein they agreed to construct such barges for the Maritime Commission and the latter agreed to pay for them. After the execution of this agreement, the Tavares Construction Company for and on behalf of the joint venture, entered into an Agreement of Lease [T. p. 49] on December 27, 1941 with the Defense Plant Corporation. Basically this lease provided that the Tavares Construction Company would design and construct for the Defense Plant Corporation, a shipyard; that the Defense Plant Corporation would defray the cost of the site, facilities and machinery; and that the shipyard upon completion would be leased to the Tavares Construction Company. The Company was to be paid nothing for its services in designing and supervising the construction other than being given an option to purchase the site, facilities and machinery of the shipyard upon the expiration or termination of the Agreement of Lease [Tr. p. 299—Stipulation 29]. The option to purchase was given by Clause 15 of the Agreement of Lease, which provided that upon the expiration of the lease or upon its termination in accordance with Clause 12 of the lease, the Tavares Construction Company was to have for ninety

days the right to purchase the site, facilities and machinery of the shipyard at the higher of two option prices, calculated according to certain formulae prescribed by the lease [T. p. 58]. Moreover in case the company declined to buy at the option price it was given the right for an additional ninety days to purchase the property or any portion thereof, at a price equal to the best offer received by the Defense Plant Corporation during that period [T. p. 60]. The Agreement of Lease also provided that the company was to pay rental in the amount of $83,327.00 per boat delivered to the Government, but that when total rental paid by the company equaled the total outlay of the Defense Plant Corporation under the Agreement, plus interest thereon, the company was no longer obligated to pay rental.

Thereafter additional contracts for ships were entered into between Concrete Ships Constructors and the Maritime Commission [T. pp. 136, 186, 234].

To the original Agreement of Lease there were added six amendments [T. p. 68] which successively raised the amount of rental to be paid by the company and also the total sums which the Defense Plant Corporation obligated itself to expend upon the shipyard.

On October 5, 1944 the total rentals paid by the company amounted to $2,775,807.01, the total sum expended by the Defense Plant Corporation plus interest thereon, so that the lease relieved the company from any further liability to pay rental for the use of the yard [T. p. 693].

On November 10, 1942, the Government commenced this eminent domain proceeding by filing its Complaint in Condemnation [T. p. 3], for the purpose of acquiring title to the shipyard site for the use by Tavares Construction Company in its shipbuilding construction for the Maritime Commission [T. p. 20]. One day later, November 11, 1942 the Defense Plant Corporation and the Tavares Construction Company entered into an Agreement Amending Agreement of Lease [T. p. 86]. This amendment in express words recognized the fact that the Government was proceeding to acquire title to the land to be used as the site [T. p. 87] and that if the Tavares Construction Company should thereafter exercise its purchase option, the company would have to pay to the Government the cost to it of the site acquired by condemnation.

Thereafter on September 23, 1944 the Government filed an amendment to its Complaint in Condemnation, adding an additional parcel (Parcel A) for the shipyard site [T. p. 24]; on October 3, 1944, its original Declaration of Taking [T. p. 28]; on January 15, 1945, its Supplemental and Amended Complaint in Condemnation [T. p. 249]; and on December 23, 1944 its Amended Declaration of Taking [T. p 42]. This last date has been stipulated as the date of taking of the interests involved in this appeal [T. p. 401].

Appellants thereupon filed a Motion for a Bill of Particulars [T. p. 259] and this motion was granted [T. p. 265]. The Government then filed a Bill of Particulars

which indicated the intention of the Government to acquire the fee simple title to all the lands in question and to acquire absolute ownership of all improvements and facilities located thereon [T. p. 266].

On January 1, 1946 all of the property was transferred by Defense Plant Corporation to the Navy Department [T. p. 289]. Thereafter on September 5, 1946 the Navy notified the Tavares Construction Company that the Navy Department elected to terminate the Agreement of Lease [Plancor 407] and any extensions thereof [T. p. 294]. Upon receipt of this notice the Tavares Construction Company made written demand upon the Navy Department, the Maritime Commission, and the Reconstruction Finance Corporation as successor to the Defense Plant Corporation that it be advised of the exact amounts of the two option prices so that it might elect whether or not to exercise its purchase option [T. p. 296]. The Navy, however, proceeded to physically destroy approximately one-third of the facilities [Tr. pp. 299, 300] without appellants' consent [T. p. 298] and over their protest [T. p. 292].

Upon pre-trial, an order was entered determining the following:

> "(1) That the lease and option rights of Tavares Construction Company, Inc. granted under the 'Agreement of Lease,' dated December 27, 1941, and by the supplements thereto, have been taken and condemned by this action.

(2) That the defendants Tavares Construction Company, Inc. have a compensable interest in the property taken by this proceeding."

In the trial below the appellants claimed that their rights under the Agreement of Lease, including the option to purchase constituted property taken by the Government and that that property had value for which the Government had to make reimbursement. These claims were challenged by the Government. After both sides had presented their evidence, the matter was submitted to the jury under instructions which amounted to a directed verdict, and the jury returned a verdict that the appellants were entitled to nothing [T. p. 1304]. Judgment was entered on this verdict [T. p. 311].

Thereafter appellants' Motion for a New Trial was denied [T. p. 366]. Appellants' Motion to Correct and Modify Record and Judgment [T. p. 381] was granted and the trial judge struck the word "option" from the judgment previously signed by him in error [T. pp. 1437-1441].

Appellants have appealed from the final judgment and from the denial of their Motion for a New Trial [T. p. 367]. Appellees, by cross-appeal, have appealed from the granting of appellants' Motion to Correct and Modify Record and Judgment. By order of this Court the two appeals have been consolidated for purposes of record on appeal, briefing purposes, hearing and submission.

Specifications of Error.

1. The trial court was in error in holding that the extinguishment of the purchase option of the Tavares Construction Company was not an item compensable in an eminent domain proceedings.

2. The trial court was in error in its instructions to the jury concerning the proper measure of compensation to be paid to the Tavares Construction Company.

3. The trial court was in error in admitting into evidence an offer of compromise made by the Tavares Construction Company.

4. The inflammatory character of the final argument of Government counsel was prejudicial error.

5. The trial court was in error in not instructing the jury as to the legal significance of the Agreement of Lease and its Amendments.

6. The evidence is insufficient to support the verdict and judgment.

7. The verdict and judgment are against law.

Summary of Argument.

The Tavares Construction Company was a lessee with a purchase option of the site, facilities and machinery of a shipyard at the time of the condemnation by the Government of all interests other than its own in that shipyard. The Company's contractual rights under the lease were "property" within the contemplation of the Fifth Amendment so that those rights were compensable items in an eminent domain proceeding.

By its own words, the lease or any rights thereunder could neither be sold, assigned nor pledged without the consent of the Defense Plant Corporation and the approval of the Maritime Commission. The lease was hence not a marketable item, and the trial court was in error in charging that "market value" of the lease was the proper measure of just compensation to be paid the Company. The correct measure was the difference between the value of the properties and the Company's option price as of the date of taking.

The lease was a complex legal document which the court should have interpreted for the jury rather than permitting that body to make its own unaided construction of that lease on the basis of non-expert testimony as to its legal import. The court was moreover in error in admitting into evidence an offer of compromise made by appellants prior to trial of the proceedings. In addition, the final argument by the Government counsel was of a prejudicial and inflammatory character, requiring the reversal and remand of these proceedings for a new trial.

The evidence is insufficient to support the verdict and judgment. The judgment of nothing does not constitute compensation.

ARGUMENT.

I.

The Trial Court Was in Error in Holding That It Was Without Power to Award Compensation to the Tavares Construction Company for the Extinguishment of the Purchase Option in the Agreement of Lease Between the Defense Plant Corporation and the Tavares Construction Company.

(The appellants in this action are all members of a joint venture known as Concrete Ship Constructors. Throughout the trial of the action, however, the interests of appellants were almost without exception referred to as the interests of the Tavares Construction Company. For the sake of uniformity we shall therefore retain that designation in this brief and refer to appellants as the Tavares Construction Company.)

The Bill of Particulars [T. p. 266] to the Amended and Supplemental Complaint in Condemnation of the United States [T. p. 249] expressed the Government's plain intention to take "the right, title, interest or estate, if any, in or to said lands and all improvements and fixtures located thereon, or in any way appertaining thereto, owned, held, or claimed by" the Tavares Construction Company. It must be conceded that the Government intended thereby to condemn all interests in the lands, improvements, and fixtures which the Tavares Construction Company acquired by reason of its Agreement of Lease [T. p. 49] and amendments thereto with the Defense Plant Corporation. One of those interests was a purchase option [T. p. 58], and it is manifest that that purchase option was extinguished or "taken" by the condemnation, for

once the property became the property of the United States the Tavares Construction Company could not thereafter have defeated the very purpose of the condemnation by exercising its option.

That this was Judge Yankwich's opinion upon pre-trial is evidenced by his Order upon Pre-trial [T. p. 310] which determined:

> "(1) That the lease and option rights of Tavares Construction Company, Inc., granted under the 'Agreement of Lease,' dated December 27, 1941, and by the supplements thereto, have been taken and condemned by this action."

Notwithstanding the fact that the condemnation proceedings manifestly divested the Tavares Construction Company of this option, the trial court indicated throughout the trial of these proceedings below that it was of the conviction that a United States District Court was not the proper forum to award the Tavares Construction Company compensation for that taking. For example the court during the trial below said:

> "When it comes to the question of value of the option, it seems to me that the case can be simplified by the optionee preserving in the Court of Claims anything subsequent to the date of the termination of the project." [T. p. 725.]
>
> . . . . . .
>
> "Anything that comes within the period up to December 23, 1944, is a relevant matter to this case. Anything that occurred subsequent to that is not relevant in this case. I am not saying that there may not arise in some other forum a claim for structure [*sic.*] breaches, etc., for damages of that kind." [T.

p. 725.] [Note: The word "structure" was corrected by the court to "frustration" T. p. 1425.]

. . . . . .

"I have been trying, as far as we can, to keep this case separate and apart from any additional claims that the defendants may have against the Government, which is litigable in the Court of Claims, and we will do that by adhering to that deadline of December 23, 1944. Anything that occurred subsequent to that is irrelevant to this issue unless the defendants bring it in themselves, and, if they do, then you have a right to respond to it." [T. p. 727.]

During another conference [T. p. 701], the court ruled that counsel for appellants could not discuss at any time before the jury the right of appellants to sue in the Court of Claims, clearly indicating by that ruling that the right to sue in the Court of Claims was deemed by the court to be a separate right not extinguished by the condemnation and hence not a factor to be considered in determining just compensation for that which had been taken.

In the hearing of appellants' Motion to Correct and Modify Record and Judgment [T. p. 1418] the court indicated that at no time during the trial of the proceedings did it conceive the "frustration" of the purchase option to be an item compensable in an action of eminent domain [T. p. 1440], and in conformity with its intention during the trial to eliminate that "frustration" as a compensable item, the court corrected the judgment [T.pp. 1436-1447], which it had previously signed in error, by striking the word "option." This was done in conformity with decision of the trial court that it was without power in this proceeding to determine just compensation for the taking of the option [T. p. 1437].

We submit however, that the trial court was in error in the opinion entertained by it during the trial that the purchase option was not a compensable item in an eminent domain proceeding. After a hearing upon that precise issue at pre-trial Judge Yankwich had already determined [T. p. 310]:

> "(2) That the defendant Tavares Construction Company, Inc., has a compensable interest in the property taken by this proceeding."

We submit that it was error for the trial not to have been conducted in accordance with this ruling upon the pre-trial.

Amendment V to the Constitution of the United States in so far as it is here relevant provides as follows:

> ". . . ; nor shall private property be taken for public use, without just compensation."

These words of the Fifth Amendment are so explicit that no serious challenge can be made to their requirement of "just compensation." Indeed, it has been held that its mandate is as applicable in war as in peace.

> *United States v. New River Collieries Company* (1923), 262 U. S. 341, 67 L. Ed. 1014, 43 S. Ct. 565.

Even the exercise by Congress of such delegated powers as the regulation of interstate commerce is subject to the Fifth Amendment requirement of just compensation.

> *U. S. v. Chicago, Milwaukee, St. Paul and P. Ry. Co.* (1931), 282 U. S. 311, 75 L. Ed. 359, 51 S. Ct. 159.

It is therefore clear in the case at bar that if the rights of the Tavares Construction Company taken by the Gov-

ernment were "private property" within the contemplation of the Fifth Amendment, the Government cannot avoid its obligation to pay just compensation for the taking.

Before determining whether those rights *are* "private property," one must first determine the exact nature of the rights which were acquired by the Tavares Construction Company under the Agreement of Lease in question [T. p. 49] and its six amendments [T. p. 68].

The Agreement of Lease, or Plancor 407, or Exhibit "W," as it was variously referred to [T. p. 49], was a lengthy agreement entered into by the Defense Plant Corporation and the Tavares Construction Company whereby the Tavares Construction Company, as Lessee, covenanted to design and construct a yard [T. p. 51] for the building of concrete barges for the Government, and the Defense Plant Corporation, as Lessor, covenanted to defray the cost of that construction so long as it did not exceed the sum of $404,500.00 [T. p. 54]. Title to the facilities and machinery was reserved in the Defense Plant Corporation [T. p. 54] but the site, facilities and machinery were leased to the Tavares Construction Company [T. p. 54], the latter agreeing to pay rental to the Defense Plant Corporation in the sum of $83,327.00 for each boat delivered by the Tavares Construction Company to the Government until the total of the rentals paid should equal the total sums expended by the Defense Plant Corporation under the agreement [T. p. 56].

To this original Agreement of Lease there were subsequently added amendments [T. p. 68 *et seq.*], which progressively raised the maximum costs of the construction to $2,798,066.00 [T. p. 93] and the maximum rentals to be paid by the Tavares Construction Company per boat delivered to $140,000.00 [T. p. 94].

In addition to the foregoing basic provisions, there were various other provisions which accorded privileges to one or the other of the parties to the agreement. These provisions will not be set out at length in this brief because of the limitations of space, but reference will be made to the individual clauses, which, we submit, gave to the Tavares Construction Company rights constituting "private property" within the meaning of the Fifth Amendment.

The first such provision was Clause 12 [T. p. 54] of the agreement which clearly effected a lease of the site, facilities and machinery in question to the Tavares Construction Company for a term ending December 31, 1949, subject only to prior termination by either party in case substantial use of the site, facilities and machinery was no longer required to enable the Tavares Construction Company to construct boats for the Government.

Clause 13 stipulated the rental to be paid to the Defense Plant Corporation by the Tavares Construction Company and provided further that the payment of such rentals would terminate when the total rental paid by the Tavares Construction Company, plus interest thereon, equalled the total outlay by the Defense Plant Corporation, plus interest thereon.

In short, Clause 12 and Clause 13, taken together, gave to the Tavares Construction Company a lease which extended to December 31, 1949, but the rentals of which terminated as soon as the Defense Plant Corporation had been reimbursed for its total expenditures.

As it turned out, the last payment of rent was made on October 5, 1944 [T. p. 693]. As of that date the Lessee had paid to the Lessor the sum of $2,775,807.01 in rental, being the total outlay of the Defense Plant Corporation plus interest, so that the Tavares Construction Company

thereupon became entitled to the leasehold, rent free, for the remainder of the term. As of the stipulated date of taking, December 23, 1944 [T. p. 401], therefore, the Tavares Construction Company was entitled to over five years' free occupancy and use of the site, facilities and machinery in question unless the lease were sooner terminated by either of the parties.

In addition to the one ground for termination provided for by Clause 12, Clause 14 provided for four additional grounds [T. p. 57]. It is to be noted that of these four grounds for termination, one alone, (a), was beyond the power of the Tavares Construction Company to prevent. As regards the others, that company might have removed them as a ground for termination by simply complying with the request of the Defense Plant Corporation for priority, by complying with the terms and conditions of the agreement, by curing a past violation of a term or condition within thirty days of written notice of a violation, etc.

Clause 15 provided as follows:

> "Upon the expiration or termination of this lease or extension thereof pursuant to paragraph Twelve hereof, or upon cancelation of this lease or extension thereof pursuant to Clause (a) of paragraph Fourteen hereof (unless such cancellation shall have been effected because of a violation by Lessee of the contracts referred to in said Clause (a)), Lessee shall have and is hereby granted, for a period of ninety (90) days after such termination, expiration or cancelation (hereinafter referred to as the 'option period') the right and option, by written notice to the Defense Corporation and to the Maritime Commission, to purchase all but not part of the Site, Facilities and Machinery at the following prices: . . ."

That clause then provided that the option price was to be the higher of two prices calculated according to certain stipulated formulae [T. p. 58]. As of December 23, 1944, the date of taking, the higher of these two calculated option prices was the sum of $2,141,236.49 [T. p. 693 and Exhibit "Q," T. pp. 1305 to 1333], plus the cost of the land [T. p. 89]. Had the Tavares Construction Company been permitted to exercise its option as of that date, it could therefore have purchased all the facilities and machinery in question for that sum of $2,141,236.49 and the land at the cost thereof to the Government. Moreover in the event that the Tavares Construction Company declined to purchase the shipyard at that price, Clause 15 gave to the Tavares Construction Company the right of "first refusal" for an additional ninety days to purchase all or any portion thereof.

Clause 26 provided that it was contemplated that the lease in question of the site, facilities and machinery might be transferred and conveyed to another branch of the Government but that upon such transfer, the Government acting through the Maritime Commission should succeed to all the rights, powers, privileges, discretion and obligations of the Defense Plant Corporation.

It is to be noted that the lease did not contemplate that such a transfer from the Defense Plant Corporation to another branch of the Government should extinguish all the rights of the Tavares Construction Company. On the contrary, the words "and, upon such transfer, the Government . . . shall succeed to all the . . . obligations of Defense Corporation hereunder . . ." indicates that there was contemplated merely a change in the identity of the Lessor under the lease—not a cancellation of that lease. Any rights therefore which the Tavares Construction Company might have had prior to such a transfer by

the Defense Plant Corporation to another branch of the Government, the Tavares Construction Company would have had subsequent to that transfer.

From this inspection of the basic agreement and its six amendments, it becomes apparent that as of December 23, 1944, the stipulated date of taking of the Tavares interests, the Tavares Construction Company (A) was lessee of a shipyard under a lease which, by its terms, ran until December 31, 1949, unless sooner terminated by either party, (B) was entitled to that leasehold rent free until December 31, 1949, unless the lease was sooner terminated by either party, (C) had an option to purchase the shipyard in the event of the termination of the lease at a calculable option price, and (D) had the right of "first refusal" for an additional ninety days in the event of its declining to purchase the shipyard at that option price.

Despite the efforts of the Government and its expert witnesses to derogate the rights of the Tavares Construction Company under the Lease Agreement, the instrument speaks for itself, and we submit that it states in unambiguous language that the Tavares Construction Company had an option to purchase the site, facilities and machinery upon the termination of the lease and that moreover the lease was to terminate at the latest on December 31, 1949. In short the company had an option to purchase, which, had not this condemnation proceedings intervened, it could have exercised at the very latest ninety days after December 31, 1949, or on March 31, 1950, and the right of first refusal up to June 30, 1950.

Both reason and authority substantiate the contention of appellants that contractual rights such as those of the Tavares Construction Company are "private property" which may be condemned and for which, upon condemnation, the sovereign must make just compensation.

For example, it has been well established that the United States is forbidden by the "due process" clause of the Fifth Amendment from legislating so as to impair the obligation of contract. The rationale of this doctrine is that contractual rights are "property" and that the United States is hence forbidden by the "due process" clause of the Fifth Amendment from depriving any person of his contractual rights, his "property," without due process of law.

Union Pacific Railway Company v. United States (1879), 99 U. S. 700, 25 L. Ed. 496;

Continental Illinois N. B. and T. Company v. Chicago, R. I. and Pacific Railway Company (1935), 294 U. S. 648, 79 L. Ed. 1110, 55 S. Ct. 595.

That contractual rights are property finds further support in the decisions under the United States Internal Revenue Code. Section 811 of that Code expressly confines the object of estate taxation to "property" as follows:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible. . . ."

Yet, bonds, shares of profits in a partnership, rights of subrogation, annuities, and life insurance policies, to mention but a few examples, have been by court decision included in the gross estate of the decedent despite the fact that each of these species of property was clearly but a contractual right at the time of the decedent's death.

Greener v. Lewellyn (1932), 258 U. S. 384, 66 L. Ed. 676, 42 S. Ct. 324;

Plummer v. Coler (1900), 178 U. S. 115, 44 L. Ed. 998, 20 S. Ct. 829;

McClennen v. Commissioner (1942), 131 F. (2d) 165;

Estate of Duval v. Commissioner (1945), 152 F. (2d) 163.

In the absence of decisions upon the precise question of whether or not contractual rights are property within the contemplation of the Fifth Amendment, we would earnestly contend that either of the foregoing lines of decisions would adequately support an affirmative answer to that question, but precedent upon this very question is not lacking. In *Monongahela Navigation Company v. United States* (1893), 148 U. S. 312, 13 S. Ct. 622, 37 L. Ed. 463, for example, the State of Pennsylvania granted to the navigation company a franchise to collect tolls from ships passing through its locks. Thereafter the United States condemned those locks under its power of eminent domain, but denied any obligation to compensate the navigation company for the resulting extinguishment of its contractual right to collect tolls. In holding that the United States must make compensation to the navigation company for the condemnation of its franchise, the Supreme Court said at 37 L. Ed. 469:

> ". . . Before this property can be taken away from its owner the whole value must be paid; and that value depends largely upon the productiveness of the property; . . ."

and at 37 L. Ed. 471 the court said:

> "Because Congress has power to take the property, it does not follow that it may destroy the franchise without compensation."

See, also:

The West River Bridge Company v. Dix (1847), 6 Howard 507, 12 L. Ed. 535.

Similarly in *Long Island Water Supply Company v. City of Brooklyn* (1897), 166 U. S. 685, 17 S. Ct. 718, 41 L. Ed. 1165, the City of Brooklyn condemned the water supply system of the plaintiff corporation and thereby extinguished the contractual right of the latter to hydrant rental. In that case the Supreme Court said at 41 L. Ed. 1167:

> "A contract is property, and like any other property, may be taken under condemnation proceedings for public use. *New Orleans Gas Light Company v. Louisiana Light and H. P. and Manufacturing Company* 115 U. S. 650, 673. *It's condemnation is of course subject to the rule of just compensation,* and that is all that is implied in the decisions such as *Hall v. Wisconsin,* 103 U. S. 5, cited by counsel." (Italics ours.)

To the argument advanced by plaintiff corporation in that same case that the condemnation in question was a contravention of the constitutional restriction against the impairment of contract, the court said at 41 L. Ed. 1167:

> "The true view is that the condemnation proceedings do not impair the contract, do not break its obligations, but appropriate it, as they do the tangible property of the company, to public use . . . The Commissioners after a hearing, valued first the tangible property at $370,000.00 and the franchise, contracts, and all other rights, and property, including this particular contract at $200,000.00. *In other words, the condemnation proceedings did not repudiate the contract but appropriated it and fixed its value."* (Italics ours.)

The foregoing decisions clearly established the doctrine that not only are contractual rights "property" which are

capable of being condemned by the state but also that just compensation must be paid for that property, when condemned.

Prior to the taking by the Government, the Tavares Construction Company had a purchase option. After that taking, the Company had nothing. Obviously, its option was extinguished by the Government's acts of condemnation, and only by those acts. It would seem to be implicit in the Fifth Amendment that what the Government takes in condemnation proceedings, the Government can, and must, make just compensation for in those same proceedings. In these proceedings, the Government took from the Tavares Construction Company its lease and the option to purchase. We believe that the Fifth Amendment requires that the Government make just compensation to the Company in these same proceedings.

We submit therefore that the trial court was in error in holding that it was without power to award compensation to the Tavares Construction Company for the extinguishment of its purchase option. To the contrary we submit that that option was a contractual right constituting "private property" within the contemplation of the Fifth Amendment; that upon its taking the Government became immediately obligated to make just compensation to the Tavares Construction Company; that that compensation is determinable in these eminent domain proceedings; and that it was error to relegate the Tavares Construction Company to the Court of Claims to establish its right to compensation.

II.

The Trial Court Was in Error in Instructing the Jury That "Market Value" Was the Proper Measure of Compensation to Be Awarded to the Tavares Construction Company for the Taking of Its Rights Under the Agreement of Lease.

(A) Under the Applicable Law of the State of California, Appellants May Assign as Error the Instructions of the Trial Court.

Before challenging the correctness of the instructions given by the trial court, we point out that it is the privilege of appellants to do so despite the fact that no exception was taken by appellants to those instructions at the time they were given.

In light of the fact that Rule 81 of the Federal Rules of Civil Procedure, Title 28, U. S. C. A., Sec. 723c expressly provides that those rules shall not be applicable to the trial of "proceedings for condemnation of property under the power of eminent domain," the Second War Powers Act provided as follows:

> "Sec. 632: The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President . . . may cause proceedings to be instituted . . . to acquire by condemnation, any real property (etc.) . . . that shall be deemed necessary for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357; Title 40, U. S. C. A., Secs. 257, 258) or any other applicable federal statute . . ."

The relevant section of the Act of August 1, 1888 is Title 40, U. S. C. A., Sec. 258 and it provides as follows:

> "The practice, pleadings, forms, and modes of proceedings in causes arising under the provisions of Sec. 257 of this title shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the state within which such District Court is held, any rule of the court to the contrary notwithstanding."

The necessity of exceptions to instructions would hence be controlled by the applicable law of the State of California. That law is Section 647 of the Code of Civil Procedure of the State of California and provides as follows:

> "The verdict of the jury, the final decision in an action or proceeding, an interlocutory order or decision, finally determining the rights of the parties, or some of them, an order or decision from which an appeal may be taken, an order sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out a pleading or a portion thereof, refusing a continuance, an order made upon *ex parte* application, *giving an instruction although no objection to such instruction was made*, refusing to give an instruction, modifying an instruction requested, an order or decision made in the absence of the party or an order granting or denying a nonsuit or a motion to strike out evidence or testimony and a ruling sustaining or overruling an objection to evidence, *are deemed to have been excepted to.*" (Italics ours.)

By virtue of this statute all of the instructions given to the jury by the trial court are properly before this court for review, despite the fact that no specific exceptions were taken to them at the time they were given.

(B) At the Time of Taking There Existed No Market for the Rights of the Tavares Construction Company Under Its Lease With the Defense Plant Corporation.

The Agreement of Lease between the Tavares Construction Company and the Defense Plant Corporation contained as its Clause 24 the following words:

> "Lessee will not without prior written consent of Defense Corporation and the approval of the Maritime Commission sell, assign, or pledge this lease or any of its rights or obligations hereunder, or sublease or permit the use by others of any of the property covered by this lease."

Those words were obviously designed to prevent that lease from becoming an article of commerce. So long as they remained unstricken there was obviously no market for the lease, for notwithstanding the fact that the agreement created rights in the Tavares Construction Company itself, that company was effectively inhibited by Clause 24 from doing anything at all with those rights other than to enjoy them itself. It could neither sell, assign, pledge, sub-lease, nor even permit another to use the site and its facilities.

Government counsel and witnesses repeatedly brought to the attention of the jury the existence of this restrictive

clause in the Agreement of Lease. Charles B. Shattuck, for example, in testifying for the Government, said:

> "Paragraph 24 provided that the Lessee should not sell, assign or pledge this lease in any manner without having the prior written consent of the Defense Plant Corporation. Also it provided that the Lessee should not sub-let either all or any part, or the machinery or the facilities, without the prior written consent of the Defense Plant Corporation." [T. p. 1102.]

Later the same witness testified:

> "With relation to the leasehold interest, it was my opinion that the terms of it were very uncertain and conjectural, so far as any possible purchaser was concerned. In other words, in the first place, it was not assignable, they could not pledge it or sell it without the consent of the Defense Plant Corporation and the country was involved in war, where the Government itself needed those kinds of facilities, and, therefore, it appeared doubtful that such a consent could be obtained." [T. p. 1113.]

In the cross-examination of Barrett G. Hindes, a witness of the San Francisco Bridge Company, the following questions were asked by Government counsel and the following answers were made by Hindes [T. p. 630]:

> "Q. By your answer with relation to the fair market value of that land, did you mean what your lease (the San Francisco Bridge Company lease) could have been sold for on the open market, for cash? A. I was referring to what it was worth to us and I conceive that it would be worth at least that much, if not more, in the open market, as to its market value or as a sub-lease.

Q. If it didn't have a sub-lease clause permitting you to sub-lease it, it wouldn't be worth anything in the open market, would it? A. That would restrict it to the value which I would put on it for my own uses.

Q. So, if the clause to which we are referring were not within that lease, you couldn't get anything for it on the open market, is that right? A. Oh, naturally, if you can't sub-lease it; if it says you can't sub-lease it.

Q. And then the value for that purpose goes out the window, is that correct? A. It would."

Then in his final argument to the jury government counsel commented upon the testimony of Hindes as follows [T. p. 1261]:

"All right. Here is the thing that Mr. Hindes said was such that he never would have even signed this lease in the first place.

'22:' —no, I beg your pardon. That is wrong. That is not the assignment clause. Mr. Hindes did not discuss this clause.—

'22: Lessee may use such site, facilities and machinery only for the construction by lessee of boats for sale to the government, unless otherwise permitted, in writing, by Defense Corporation with the consent of the Maritime Commission noted thereon.'

'24: Lessee will not without prior written consent of Defense Corporation and the approval of the Maritime Commission sell, assign, or pledge this lease or any of its rights or obligations hereunder, or sublease or permit the use by others of any of the property covered by this lease.

'Mr. Willing Buyer, I want to sell you this lease. I want to assign it. I want to sublet a part of it to you. What will you give me?

> 'Why, Mr. Tavares you can't do that without you get the consent of the Defense Plant Corporation and the Maritime Commission. I wouldn't give you five cents for it. How do you know that they are going to let you make a profit on this paper? Is it reasonable to suppose after they put up for you $2,700,000.00 and build you a shipyard, that they will permit you to go ahead and sell this paper.' "

Indeed each individual juror was privileged to examine the actual Agreement of Lease itself, admitted into evidence as it was as Exhibit "W" [T. p. 697], and thereby to confirm the testimony of witnesses and statement of counsel that the Agreement of Lease in question was incapable of alienation by the Tavares Construction Company unless such alienation was consented to by the Defense Plant Corporation and was approved by the Maritime Commission.

As with all other properties so restricted in its alienability, the market for the lease, if not completely nonexistent, was so narrow as to be virtually so. Government counsel not only conceded, but insisted, that only the foolhardy would have bought such a lease in the very teeth of its own prohibition against sale, and with this contention appellants are in complete accord. At the date of taking there clearly existed no wider market for the rights of the Tavares Construction Company than the market for an inalienable life estate or the market for the income from a spend-thrift trust.

(C) "Market Value" Is Not the Proper Measure of Just Compensation When the Condemned Property Is Not Marketable.

In condemnation proceedings market value of the property taken is admittedly the normal measure of just compensation.

Indeed in *United States v. Miller* (1943), 317 U. S. 369, 63 S. Ct. 276, 87 L. Ed. 336, the Supreme Court said:

> "It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for that purpose. In an effort, however, to find some practical standard, the courts early adopted and have retained, the concept of market value."

In spite of this broad generalization, the Supreme Court has recognized in other cases that under certain circumstances "market value" is simply not an appropriate measure of compensation in condemnation proceedings. In the late case of *United States v. General Motors Corporation* (1945), 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 311, for example, that court, speaking through Justice Roberts, said at 89 L. Ed. 318:

> "In the light of these principles it has been held that the compensation to be paid is the value of the interest taken . . . in the ordinary case, for the want of a better standard, market value, so-called, is the criterion of that value. *In some cases this criterion cannot be used either because the interest condemned has no market value or because, in the circumstances, market value furnishes an inappropriate measure of actual values.*" (Italics ours.)

That same court in *United States v. New River Collieries Company* (1923), 262 U. S. 341, 43 S. Ct. 565, 67 L. Ed. 1014, had earlier recognized that "market value" was not an invariable measure of value. That case involved the requisitioning by the government of a quantity of coal owned by the plaintiff. In speaking of the measure of compensation, the Court said at 67 L. Ed. 1017:

> "Where private property is taken for public use, and *there is a market price prevailing at the time and place of the taking, that price is just compensation.*" (Cases cited.)
>
> "The United States admits that market price is usually a basis for ascertaining the pecuniary equivalent, but suggests that sometimes an article has no market price, and that in such cases 'proof of real value' is admissible and that therefore market value and just compensation are not necessarily synonymous. The court below excluded evidence offered by the United States to show the owners cost of production and a reasonable profit. This ruling was right, because *it was shown beyond controversy that there were market prices prevailing when and where the coal was taken.*" (Italics ours.)

The court also quoted with approval the following language from the opinion of the Circuit Court of Appeal (276 Fed. 690 and 692):

> *"If it be an article commonly traded in on a market, and it is shown that, at the time and place it was taken there was a market in which like articles in volume were openly bought and sold,* the prices cur-

> rent in such a market will be regarded as its fair market value and likewise a measure of just compensation for its requisition." (Italics ours.)

and concluded its opinion with these words at 67 L. Ed. 1018:

> "The owner was entitled to what it lost by the taking. The loss is measured by the money equivalent of the coal requisitioned. It is shown by the evidence that every day representatives of foreign firms were purchasing, or trying to purchase, export coal. Transactions were numerous and large quantities were sold. Export prices for spot coal were controlled by the supply and demand. *These facts indicate a free market.* The owner had a right to sell in that market, and it is clear that it could have obtained the prices there prevailing for export coal. It was entitled to these prices."

See, also:

> *Blake Company v. United States,* 275 Fed. 861 (1922).

These words of our highest court make indisputable the fact that as a prerequisite to the application of "market value" as the measure of compensation there must be, if not a "free market" at least *a market.* When there is such a market, "market value" furnishes a simple and convenient measure of compensation. When, however, a market is demonstrably non-existent, "market value" is clearly a fiction and cannot be invoked as a fair measure of the just compensation commanded by the Fifth Amendment.

(D) The Trial Court Instructed the Jury That "Market Value" Was the Proper Measure of Compensation to Be Awarded the Tavares Construction Company and Hence Directed the Jury to Apply an Inappropriate and Inapplicable Measure of Compensation.

The trial court's instruction to the jury is given in full in the transcript [T. p. 1279]. Because of their length we shall not set them out in full in this brief. The following extract will be sufficient however, to indicate the measure of compensation which the trial court instructed the jury to apply:

> "Ladies and gentlemen of the jury, you are instructed as follows . . . [T. p. 1287]. In determining the fair market value of lands taken, the just compensation to the owner is that sum of money which, considering all of the circumstances disclosed by the evidence, could have been obtained for the lands by an informed seller offering them in the open market for cash. It is the amount that in all reasonable probability would have been arrived at between an informed owner, willing, but not compelled to sell, and an informed purchaser, willing, but not compelled to buy. In arriving at that value, you will take into account all the considerations that would fairly be brought forward and reasonably be given weight by well informed men engaged in such bargaining . . . [T. p. 1293]. With relation to the interests of the defendant, Tavares Construction Company, and its associates, such interests are to be evaluated at a later date than the interests of other defendants taken herein. The interests of the Tavares Construction Company and its associates arise out of an instrument which is in evidence as defendants' Exhibit W, an agreement entered into between Tavares Construction Company and the Defense

Plant Corporation; you are to determine what is the fair market value of the interests arising out of such instrument, to wit, what is the amount for which the interests of said Tavares Construction Company and its associates under said instrument of agreement could have been sold for on the open market for cash on December 23, 1944, the date it was taken or cancelled by this proceeding or within a reasonable time thereafter; and in this connection if you find that the interest of Tavares Construction Company and its associates under said instrument of agreement is so speculative and conjectural that no purchaser in the open market would have purchased the same except for a nominal consideration, then your verdict as to the interest of the Tavares Construction Company and the Concrete Ship Constructors herein must be in a nominal figure only. You are to take into consideration the terms and conditions of the whole of said agreement and are to consider what effect, if any, a willing seller and a willing buyer would give to all of the terms and conditions of said agreement with Defense Plant Corporation in arriving at a determination as to the price for which the interest of said Tavares Construction Company and its associates under said instrument of agreement would bring at such sale . . . [T. p. 1295]. Evidence has been received in this case in relation to the interest of the defendant, Tavares Construction Company, Inc. That interest arises out of an instrument which is in evidence as defendant's exhibit W. That interest is a lease coupled with an option. In your consideration of that feature of the case you will proceed in the same manner as you proceeded as to the market value of the land, the question being what could it have sold for on the open market for cash on December 23, 1944, the date it was taken

> or cancelled by this proceeding, or shortly thereafter, above what Tavares Construction Company would have to have paid under all its terms and conditions. If you find the company could have made such a sale your verdict will be for the amount you in your judgment determine the company could have gotten for it. You will consider the entire instrument, not just parts of it. *If you find it could not have been sold then your verdict as to Tavares Construction Company, Inc., will be zero.*" (Italics ours.)

Sometime after the jury retired from the courtroom to deliberate, it returned and asked to hear again the instructions concerning the Tavares leasehold [T. p. 1300] and in compliance with this request the trial court repeated the prior instructions concerning the Tavares Construction Company.

It is obvious from the record that the jury was hence charged not once, but twice, that as regards the Tavares Construction Company the proper measure of compensation was "market value."

As regards appellants the court's instructions may be summarized in the final single sentence:

> "If you find it could not have been sold, then your verdict as to Tavares Construction Company, Inc. will be zero." [T. p. 1295.]

In light of the manifest non-existence of any market for the lease in question, such an instruction, we submit, was nothing more than a direction by the court to award nothing to the Tavares Construction Company as compensation for the taking of its contractual rights under its lease with the Defense Plant Corporation. As such a direction, that charge was, we believe, clearly reversible error since there was testimony in the record that those

rights were worth $600,000.00 [T. p. 802], $500,000.00 [T. p. 831], $573,000.00 [T. p. 869], and $500,000.00 [T. p. 881]. When that evidence is interpreted in the light most strongly in favor of the appellants, we submit that it could under no conceivable interpretation support a directed verdict for the appellees.

Even if those instructions are not interpreted by this court as being tantamount to a directed verdict for the appellees, we submit that the trial court was clearly in error in setting up "market value" as a proper measure of just compensation for the taking of property for which there was admittedly no market. "Market value" in this case was no more appropriate as a measure of compensation than would be "value to the owner" if a microscope were taken from a blind man, or gloves from an armless man.

Government counsel sought throughout the proceedings to prove that the rights of appellants were inalienable but then asked for, and was given, an instruction predicated upon the property in question having the very thing the Government proved that it did not have—a market. We submit that the Government would have been no less inconsistent had it proved that the property taken was realty but then sought an instruction that the measure of compensation should be the market value of eggs.

The option to purchase was originally given to the Tavares Construction Company in exchange for a valuable consideration. As stipulated by counsel [T. pp. 738, 698 and 299—Stipulation 29], that option was granted by the Government in lieu of the normal contractor's fees to which the Tavares Construction Company would have been entitled for its work in the erection and construction

of the yard and works which the Government has condemned in these proceedings. The Tavares Construction Company parted with its right to receive fees of a very substantial character in order to obtain that purchase option. Now the Government contends that that option is valueless and that it may take back the lease coupled with the option without making any compensation to the Tavares Construction Company. Because the lease and option could not be alienated without the consent of the Government, the Government claims they had no value. Yet, to obtain that very option, the Tavares Construction Company surrendered its right to receive fees which measured in accordance with the evidence [T. pp. 741 and 765] amounted to approximately $270,000.

Should it be held that "market value" is the proper measure of compensation for the taking of inalienable property, the Government would thereby be placed in a position whereby it could avoid the necessity of performing any of its contracts. By the simple expediency of stipulating in each of its contracts that the contract could not be alienated without the consent of the Government, the Government could then condemn any one of those contracts when the obligations of the contract became burdensome—and moreover, make no compensation for the taking! Such a procedure, we believe, could not be held to meet the requirements of the Fifth Amendment. Nor, we submit, does that attempted procedure meet those requirements in the case at bar.

The crux of the entire proceedings below was valuation. In light of its paramount importance we submit that the trial court's instructions that "market value" was the proper measure of compensation was clearly reversible error requiring the remand of this cause for a new trial.

(E) The Appropriate Measure of Compensation for the Condemnation of the Rights of the Tavares Construction Company Under the Agreement of Lease Is the Difference Between the Value of the Facilities, Machinery and Site as of December 23, 1944, and the Option Price on That Same Date.

From the admitted power of the Defense Plant Corporation to block the sale, assignment, pledge or sub-lease of the Agreement of Lease, Government counsel and witnesses proceeded to draw the demonstrably insupportable conclusion that the lease was therefore of no value.

The fallacy of such a position may best be revealed by pointing out that there are many things which cannot be alienated—but which yet have value. A life estate restricted against alienation can be neither sold, pledged, assigned, sub-leased nor given to another, yet to the life tenant it clearly has value. Likewise the income from a spendthrift trust is in many states incapable of being anticipated by assignment, pledge, gift or sale, yet to the life beneficiary it clearly has value.

Traditionally property is considered as being a "bundle" of rights, one among them being the right of alienation. The basic fallacy of the Government lies in its contention that the rights to use, to enjoy, and to exercise a purchase option are valueless to the Tavares Construction Company in the absence of the right to alienate. Certainly in states having inheritance taxes one is not privileged to consider such inalienable property to be valueless when computing the inheritance tax due upon the devolution after death of property restricted against alienation during the life of the devisee. Nor under the Federal Estate and Gift Tax sections of the Internal Revenue Code is the transfer of such inalienable property considered by the Commis-

sioner of Internal Revenue to be the transfer of property having no value.

If the Government's position were tenable, any transfer of land held in trust for charitable purposes would be a transfer of no value, for it is obvious that there exists no market for property encumbered with such a trust.

As pointed out by counsel for appellants in the hearing of their Motion for a New Trial, the affection of a spouse is hardly a saleable commodity, yet in a suit brought for alienation of affection the affection of a spouse is repeatedly held to be a thing of value. Likewise, one's arms are not marketable, yet the courts do not deem an arm to be valueless when it has been injured or lost through the negligence of another.

Such examples of inalienable, but valueable, property may be multiplied with ease, but the few instances which we have here cited establish beyond question, we believe, that alienability, though admittedly enhancing value, is not a *sine qua non* of value.

The question then arises: Admitting that the rights of the Tavares Construction Company may have value despite the fact that they were not marketable, what is the proper measure of their value in eminent domain proceedings?

The courts in the past have not deemed themselves powerless to determine just compensation when the evidence revealed that there was no market for the condemned property. Nor is this court powerless to establish just compensation in the case of the inalienable option of the Tavares Construction Company.

In *Matter of Albany Street* (1834), 11 Wend. (N. Y.) 149, certain land was taken from the churchyard of Trinity Church for use as a street. In speaking of the proper measure of just compensation, the court said:

> "It seems to me the true rule of estimating the damage is to appraise the property at its present value to the owner, considering the extent of the interest which the owner has, and the qualified right which may be exercised over it. If the church holds the absolute interest in the churchyard and may, if they choose, convert it all into building lots, then the rule adopted by the Commissioners in their assessment for damages is correct; but then they should apply the same rule in their assessment for benefits. If on the other hand, the church, as I suppose, cannot use the churchyard for any purpose but for burying the dead, then a different rule should be adopted, both as to damage and benefit."

The rule there adopted by the New York Court when the use of the land is so restricted as to eliminate any market for it, was "its present value to the owner, considering the extent of the interest which the owner has, and the qualified rights which may be exercised over it."

In *Matter of East River Gas Company* (1907), 119 App. Div. 350, 104 N. Y. Supp. 239, the gas company sought to condemn a tract of land upon an island which had been deeded to the City of New York for perpetual use for general charitable purposes. Because of that limitation in its deed, the City of New York was obviously incapable of conveying title in fee simple. In the condemnation, however, damages were awarded to the city measured by what "the property would be worth for ordinary commercial purposes if presently available therefor." In

short, in its award of damages the court treated the property as if it were freely alienable notwithstanding the fact that it was manifestly otherwise.

See, also:

Stebbing v. Metropolitan Board of Works, L. R. 6 Q. B. 57 (England, 1870).

The absence of uniformity among cases involving the condemnation of restricted property indicates that, given a situation making inapplicable "market value" as a standard, the courts must, in the exercise of their own wise discretion, evolve a standard, which, under the circumstances, is most likely to measure a compensation which is "just."

Our examination of the lease agreement here in question has already established, we believe, that the Tavares Construction Company had at the date of the Government's taking a non-transferable right to possess and use the shipyard in question, rent-free until December 31, 1949, unless the lease was sooner terminated by either party, in which event the company had for ninety days a right to purchase the shipyard at an ascertainable option price and the right of "first refusal" for an additional ninety days.

The Tavares Construction Company hence had an interest in property under lease. Now, in the condemnation of leased property the accepted rule is that the total award must be based upon the value of the undivided fee. For instance in *State v. Anderson* (1929), 176 Minn. 525, 223 N. W. 923, the court stated:

". . . No contracts between the owners of different interests in the land can affect the right of the

> Government to take the land for the public use or oblige it to pay by way of compensation more than the entire value of the land as a whole."

And in *Carlock v. United States* (1931), 53 F. (2d) 926 it was said:

> "The total amount of damages must be the same, whether the land is owned by one person or several."

Indeed, as regards the interests of the defendants, City of National City, as lessor, and of the San Francisco Bridge Company, as lessee, the trial court so instructed the jury [T. p. 1292]. As between the City of National City and the San Francisco Bridge Company the charge correctly effected an apportionment of the total award.

The trial court, however, made no such requirement of apportionment concerning the interests of the lessor Defense Plant Corporation and the lessee Tavares Construction Company despite the fact that the Tavares Construction Company, like the San Francisco Bridge Company, was a lessee and, as such was part owner in possession of the shipyard.

The peculiarity of this particular condemnation—and that which has made these proceedings a great deal more complex than they would otherwise have been—is that the Government has played a dual role in the condemnation. It was the condemnor and at one and the same time part owner of the property condemned. As regards the realty, the condemnation extinguished the rights of the Government as lessee from the City of National City and likewise its rights as lessor to the Tavares Construction Company. As regards the personalty the condemnation extinguished the Government's rights as lessor to the

Tavares Construction Company. Faced with this duality of the Government in the condemnation, the trial court simply ignored the ownership of the Government prior to the condemnation proceedings. For the Government this amounted to a gift since it was thereby not compelled to share any part of the "award" with the Tavares Construction Company. As regards the Tavares Construction Company, however, this ignoring of the Government's prior ownership was most prejudicial in that it gave to the Government exclusively that which should have been apportioned between the Government and the Tavares Construction Company.

It would facilitate analysis of the problem to assume that a private person, X, stood in the shoes of the Defense Plant Corporation (or the Government) at the time of the condemnation. It is self-evident that the total award for the facilities and machinery would then have had to be apportioned between X, as lessor, and the Tavares Construction Company, as lessee, on the basis of X's absolute ownership of that property and the lease and option of the Tavares Construction Company.

Certainly under these circumstances, it could hardly be maintained that X would be entitled to the entire award and the Tavares Construction Company be entitled to nothing. Yet, with the Defense Plant Corporation substituted for X, the judgment of the court below was in effect an award of all of the facilities and machinery to the lessor, the Defense Plant Corporation, leaving nothing for the Tavares Construction Company, as lessee.

We believe it to be incontrovertible that there should have been a total award, apportioned between the Defense Plant Corporation and the Tavares Construction Com-

pany. Any apportionment of this award to the Defense Plant Corporation would of course have been fictional, or a mere bookkeeping transaction, since the Defense Plant Corporation was itself an agency of the Government. Unless, however, the ownership by the Defense Plant Corporation of the machinery and facilities is treated for purposes of valuation as having been condemned, the trier of fact, as in the trial below, is confronted with the insuperable task of making its evaluation in a vacuum, that is, of trying to evaluate a leasehold without reference to the value of the property leased.

We submit that the valuation of the entire leased property is mandatory even when the Government is both the condemnor and the lessor of the property condemned.

The problem of establishing a formula whereby the total award may be justly apportioned between the lessor and the lessee with an option to purchase, though seemingly difficult, is in reality amenable to certain well established principles.

In 5 Williston on Contracts, Section 1338 it is said:

> "In fixing the amount of (damages for breach of contract) the general purpose of the law is, and should be, to give compensation, that is, to put the plaintiff in as good a position as he would have been in had the defendant kept his contract."

And this general principle has given rise to the well known rule that the plaintiff in an action for breach of contract is entitled to damages measured by the difference in value between that which he would have received and that which

he would have had to surrender had the contract been performed on both sides.

Pierson v. Iwai (1922), 285 Fed. 774;

American Mfg. Co. v. United States Shipping Board (1925), 7 F. (2d) 565.

In the case of an option to purchase, the measure of damages, the compensation necessary to "put the plaintiff in as good a position as he would have been in had the defendant kept his contract," is clearly the difference in value between that which the optionee would have received and the price he would have had to pay had he exercised his option to purchase. If that measure of damages gives to an optionee just compensation when his option has been lost by breach of contract, we submit that that same measure is applicable when the option has been taken by the Government in an eminent domain proceedings inasmuch as the mandate of the Fifth Amendment is only that the compensation be "just."

In the case at bar the compensation due the Tavares Construction Company would be, we submit, the difference between the option price as of December 23, 1944, and the value of the site, facilities and machinery as of that same date. Such a measure is one of convenient and easy application by the trier of fact since the option price was on the date of taking a sum calculable by means of formulae stipulated in the Agreement of Lease [T. p. 58] and the value of the shipyard as of that date is a matter for expert testimony.

We wish to make it clear that we do not contend that a contract measure of damages is intrinsically the proper measure of damages in these proceedings. Our conten-

tion is simply that in this particular condemnation proceeding, as between the Defense Plant Corporation and the Tavares Construction Company, such a measure is an appropriate measure of "just compensation" for the property taken from that Company.

As long ago as 1856 this problem of awarding just compensation to a lessee with a purchase option was before a Pennsylvania court in *Northern Pacific Railway Company v. Davis and Leeds* (1856), 26 Pa. 238. In that case the lessees had a lease of certain land for two years at $600 per year with an option of a three year renewal at $800 per year. The Northern Pacific Railway then condemned the land but challenged an award which reflected the value of the renewal option. In upholding the award, the reviewing court said at page 241:

> "The direct injury done to them—or in other words the value of the thing taken from them, was to be measured by the worth of the lot, at the stipulated rent, for the residue of the term of two years, and for the whole of the term of three years. No assessment of damages or compensation would have been just and adequate that did not embrace both these terms, for the true measure of the interest the lessees had in the land was the joint or aggregate value of the two terms."

And at page 242 the court said:

> "The defendants held their interest, as all citizens hold real estate, subject to appropriations for public use, but their right of compensation was coextensive with their interest, and the company having taken the whole of it, the inquest did no more than assess the value of the whole."

Similarly in *Herzey v. Board of Chosen Freeholders of Essex County* (1926), 99 N. J. Eq. 525, 133 Atl. 872, the lessee of certain premises had a three-year lease with a renewal option for two years, but upon condemnation of the premises the lessor claimed the entire award. In apportioning the award between lessor and lessee, the New Jersey Court of Chancery said at 133 Atl. 872:

> "The lessee is entitled to compensation for the value of her lease for the unexpired term, plus the sum that the value of the option adds to the value of the lease for the unexpired term."

The lessee was thereupon awarded $287.50 as compensation for the unexpired term and $600 for the renewal option.

The case which most nearly resembles the case at bar is *Phoenixville, Valley Forge, and S. E. Railway Company's Appeal* (1918), 70 Pa. Sup. Ct. 391. It appeared that the optionee in that case had acquired an option to purchase for $3,975.00 certain lands which the state thereafter condemned for a park. Subsequent to the initiation of the condemnation proceedings, the optionee sought to exercise its option. The "viewers" of the property awarded nothing to the optionee, but this was reversed on appeal, the court saying at page 395:

> "One who under a properly executed agreement has an option to purchase land does not hold the lands, nor even an absolute agreement that he is to have the lands conveyed to him, but he does get something of value, that is, the right to call for a conveyance of the land if he elects to purchase in the manner specified."

The court then held that the owner of the land was entitled to $3,975.00 of the award and that the railway was entitled to the balance of the award over and above the option price.

We submit that in the case at bar the Defense Plant Corporation is likewise entitled to an apportionment equal to its option price as of the date of taking, but that the balance of the total award, if greater than the option price, must go to the Tavares Construction Company.

Other cases, noteably *Cullen and Vaughn Company v. Bender Company* (1930), 122 Ohio State 82, 170 N. E. 633; *Cornell and Andrews Smelting Company v. Boston and P. R. Corporation* (1911), 209 Mass. 298, 95 N. E. 887, and *Schnee v. Elston* (1930), 299 Pa. 100, 149 Atl. 108, have invoked a "trust fund" doctrine to arrive at the same result in making the apportionment of an award between a lessor and a lessee with a purchase option. This doctrine is that the owner of the property, the lessor, is to be given the entire award, but that he must then hold that award as a trust fund subject to the option of the lessee to purchase that award by paying to the lessor the option price of the condemned property. In other words, the award is treated in legal contemplation the same as the property taken in condemnation. Whether the total award be here apportioned by the court between the Defense Plant Corporation and the Tavares Construction Company or whether the total award be given to the Defense Plant Corporation subject to the right of the Tavares Construction Company to acquire that award by exercising its purchase option is immaterial to the appellants. In either case the compensation for the Tavares Construction Company would be the difference between

the total award and its option price as of the date of taking.

We submit therefore that the judgment of the trial court should not only be reversed but that these proceedings should be remanded to that court with directions to make an award of compensation in accordance with the principals here set forth.

III.

The Trial Court Was in Error in Admitting Into Evidence Certain Correspondence Relating to an Offer of Compromise by the Tavares Construction Company.

Counsel for the Government offered in evidence [T. p. 769] a certain letter and, over the objection of counsel for the appellants, that letter was received in evidence. The letter in question, written by Concrete Ship Constructors and directed to the Eleventh Naval District, read as follows:

> "In explanation of our letter of November 21, 1944, and in compliance with Captain F. P. Conger's requests, we wish to be more specific regarding the considerations for our release of the option held by this company, for the acquisition of certain facilities at National City California with the Defense Plant Corporation. These considerations are as follows:
>
> 1. To permit this company the free use of existing facilities to complete necessary war contracts.
>
> 2. To permit this company the free use of facilities to carry on ship repair work for Governmental agencies until such time as the Navy needs to convert these facilities to other purposes.

3. To give this company a contract for the construction of the necessary Navy alterations to convert property to Navy requirements.

Alternate for Item 3: Make payment to this company in the sum of 3% of the facilities construction costs, or $80,000.00 which is equivalent to a minimum construction fee for constructing the facilities.

"For your information, no fee or profits was allowed us for the facility construction, but in lieu thereof we were granted an option to purchase and the use of the facilities."

This letter was at the most but an offer of the Concrete Ship Constructors (or the Tavares Construction Company) to compromise its claim against the Government arising out of the condemnation of its lease and option.

It is well established that such offers of compromise are inadmissible in evidence upon the trial of a claim which one or the other of the parties sought to compromise. In 3 Jones Commentaries on Evidence, Section 1052, it is stated:

"Overtures for the compromise of controversies are frequently made by parties who, in good faith, believe in the justice of their claim or defense, but who desire to avoid the annoyance and uncertainty of litigation. Hence, offers of compromise are not necessarily any admission that the claim or defense is lacking in merit; and, in a civil action at least, such offers are not in general admissible."

In section 1054 of the same treatise it is flatly stated:

"Offers by a party, with a view to compromise, to pay or accept a sum of money or to make deduction, or to submit to arbitration, or to surrender certain

property, or to purchase the property in dispute, and in general any efforts to secure a settlement, are inadmissible."

At the time the letter in question was offered in evidence, counsel for appellants made the specific objection that it was "part of an unaccepted offer of compromise, which resulted from negotiations carried on between the parties to this action for the period of at least one year." This objection, however, was overruled [T. p. 769] and the offered letter was admitted despite the fact that section 997 (formerly Sec. 895) of the Code of Civil Procedure of the State of California expressly provides that an offer of compromise and failure to accept cannot be given in evidence.

> "Sec. 997. The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the offer, with proof of notice of acceptance, and the clerk, or the justice where there is no clerk, must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer."

See:

Scott v. Sciaroni (1924), 66 Cal. App. 577, 226 Pac. 827.

The case of *Citti v. Bava* (Calif., 1927), 254 Pac. 299, laid down the following rule:

> "If a clear admission of a distinct fact is made in the course of negotiations for a settlement, such fact is admissible in evidence against the party making it, even though it forms a part of an offer to compromise, but all other admissions in negotiations for a compromise are regarded as hypothetical admissions, from which it is not proper to draw any inference of liability, and are therefore not to be received in evidence."

The court went on to say at page 304:

> "It is very often a wise thing, however unsound a complaint may be, for a person to pay a sum of money and buy his 'peace' and thereby rid himself of the annoyance and trouble incident to litigation. Peace to some people is so desired that they seek it, even at a sacrifice of their legal rights, and in such a case the purchase of peace is not to be taken that the purchaser was at fault, but merely that he is willing to sacrifice his legal rights and pay a sum of money to quiet the complainant and avoid trouble and litigation."

We submit that this rule is equally applicable to the offer in evidence of appellants' letter. That letter was nothing more than an attempt to establish a basis upon which a settlement might have been worked out—not an admission that appellants valued their lease and option at no more than $80,000, as counsel for the Government argued before the jury. [T. p. 1265].

We submit therefore that the admission into evidence of that offer of compromise was most prejudicial to appellants and was error requiring the reversal of the judgment below.

IV.

The Final Argument of Government's Counsel Was Designed to Prejudice and Inflame the Minds of the Jurors and, as Such, Was Reversible Error Requiring the Remand of These Proceedings for a New Trial.

The type of final argument made by Government's counsel may best be illustrated by reproducing the many inflammatory statements made in the course of that argument. The following extract reveals the extent to which that argument was designed to arouse the prejudices of the jurors against appellants:

> "Mr. Landrum: May it please the court, ladies and gentlemen of this jury . . . [T. p. 1255]. Whatever else may be said Mr. Tavares is a capable business man. He cut himself into this wartime Garden of Eden without the expenditure of a penny. He built concrete barges for the government of the United States at a profit, and now he asks you to put your hands into the pockets of the people of the United States and to give him a half a million more . . . [T. p. 1267]. Ladies and Gentlemen, on the 24th day of November, 1944, they say, 'We want you to give us $80,000 for supervising the putting in of the things you bought for us to make ships with to sell to you. We want you to give us $80,000.' You will have these papers. If that isn't right—if what I have read to you isn't right, throw me out the window. But, my goodness, are you going to permit those people to go into the Treasury of the United States, when we come in here in a condemnation case, and get any more? Well, if you think they are entitled to that, you give it to them. But if you think it would be right for me to say to you, 'I want

to get some money out of this war business. I want you to spend $2,700,000.00 to build me a shipyard to build concrete ships to sell to you at a profit, and then after it is all through and done, I want you to give me $80,000 for building my own shipyard, and supervising that, and then on top of that I have taken the expenses, I have taken vacations for my office force.' . . . [T. p. 1268]. They were using the facilities which were purchased by the money of the people of the United States to engage in private repair work for private individuals and asking you to come in here and give them a half a million dollars. . . . [T. p. 1275]. And, ladies and gentlemen, it is my very earnest conviction, when you have done that, you will say to the people of the United States, 'We do not feel that we are going to take any of your money to give to the Tavares Construction Company.' . . . [T. p. 1277]. I feel I have been as honest and fair as it is possible for me to be. I want you to know that I consider it a great honor to have the long experience I have had. I entered the Department of Justice in 1909. I am proud of it. I have grown old and tired. I want to go home. *But this Tavares claim hurts me.* . . ." (Italics ours.)

These statements of counsel were absolutely without foundation in the record. There was no evidence at all that the Tavares Construction Company had made a large profit—nor even a small one. But had there been evidence in the record that the company had made a profit of ten million dollars or even ten billion dollars, we submit that it would have had no relevance whatsoever in the determination of the just compensation to be awarded the company for the taking of its property. To demonstrate the irrelevance of past profits, we need only point

out that when the Government condemns the bridge of a toll company, no inquiry is permitted as to whether the company has recouped its original investment by the collection of tolls. Yet, to be consistent with its position in the case at bar, the Government would have to contend that the company would be entitled to nothing upon condemnation if the total of its tolls had already equalled its original outlay in construction of the bridge. Similarly the Government would have to contend that a farmer would not be entitled to compensation for the condemnation of his land if his total return from the farming of that land had already equalled its original purchase price to him. Such a contention is, of course, completely untenable, yet in the case at bar, the implicit argument of the Government was that the Travares Construction Company should be allowed no compensation because it had already received enough from the Government. Government counsel of course knew better than that and refrained from making such an express argument; but that argument is implicit in counsel's every reference to what the Government had already done for the Travares Construction Company. The Government's argument was that since the Tavares Construction Company had profited from part performance of its contract with the Defense Plant Corporation, it was not entitled to full performance. We submit that the law of contracts long ago established the converse.

Because of the repeated and unwarranted references by Government's counsel to the things that the Tavares Construction Company had already received from the Government, the jury might easily have arrived at its decision on the ground that the Tavares Construction Company had thereby already received what the jury deemed

to be "just compensation" for the taking of its property. Certainly there can be no assurance, with the Government counsel's argument in their minds, that the jurors did not permit themselves to be influenced by that argument.

We submit therefore that the final argument of the Government in itself warrants the reversal and remand of this case for a new trial.

V.

The Trial Court Was in Error in Permitting the Jury to Determine the Legal Significance of the Agreement of Lease and Its Amendments Rather Than Instructing the Jury as to the Rights and Obligations of the Parties Thereunder.

Government counsel attempted to prove the legal import of the Agreement of Lease and amendments by means of witnesses patently unqualified to construe such legal documents. The Government witnesses, Charles B. Shattuck, who, by his own testimony, was a "realtor and a real estate appraiser" [T. p. 1091], and Tom Mason, who, by his own testimony, was a "realtor and appraiser" [T. p. 1161], testified repeatedly as to their construction of certain clauses in the agreement and its amendments. Their lack of qualification so to testify is made apparent by the number of their conclusions which are demonstrably in error.

For example [T. p. 1114], Shattuck testified as follows:

> "Q. In other words, it is your understanding of Exhibit 'W' that they only have the use of the yard rent free when they were constructing boats for the Government? A. Yes."

Prior to that he had already testified [T. p. 1104] to the same effect in the following words:

> "There was a proviso in the lease which provided that the Tavares Construction Company was to have the free use of the site, and the machinery and the facilities after they had paid sufficient rent to reimburse the Government for the entire cost that it had been put to in the creation of this enterprise. *However that free rent was to be given them only for the construction of boats for the Government.*" (Italics ours.)

As a matter of fact, however, the Agreement of Lease contained no such limitation that the rent should be free only if the company was constructing boats for the Government. The pertinent clause in the lease [T. p. 56] merely provided as follows:

> "When the total amount of rental which lessee shall be required to pay hereunder shall equal the amount expended by Defense Corporation under this Agreement plus interest on such expenditure . . . from the date thereof at the rate of 4% per annum less an amount equal to interest at 4% of each rental payment from the date of payment thereof, lessee shall not be required to pay any further rental."

Shattuck also testified as follows [T. p. 1113]:

> "Likewise the lease provided that this site, and this yard, and these facilities could only be used for the construction of boats for the Government, and that if at any time it was not so used, the Government had an option under paragraph (b) of paragraph 14 to transfer the facilities to any other department of the Government, and if it elected, if the Government should elect to do so, the lease could

be cancelled and no option could be had, and, therefore, you might say that the person who had this lease was merely there at the will of the Government."

Clause 14 of the Agreement of Lease, however, as a matter of fact, provided otherwise. Its words were as follows [T. p. 57]:

"Defense Corporation, by notice in writing with the approval of the Maritime Commission noted thereon, may, in addition to all other rights with reference to termination under paragraph 12 hereof, cancel this lease or extension thereof, in the event . . . (b) the Government shall request priorities for itself or others with respect to the use of the facilities to be provided hereunder, and Lessee shall fail or refuse to give such priority . . ."

The most cursory examination of the words of the agreement itself reveal that the testimony of Shattuck in this regard was not only wrong but was highly misleading. His testimony was that the Defense Corporation could cancel the lease in question by merely exercising its right of priority. The Agreement of Lease itself clearly indicates that the Defense Corporation could cancel the lease only if it asked for priority but was refused it by the Tavares Construction Company. The difference between the two is, to say the least, significant. That Shattuck had an entirely erroneous conception of the Government's right to priority is revealed by the following which transpired upon cross-examination [T. p. 1126]:

"Q. So it is your understanding that under the lease the Government had a right, through exercising its priority rights therein granted, to merely take

over and use this property, and thereby end and terminate all rights of Concrete Ship Constructors? A. I don't think there is any question about it."

Shattuck was right in testifying that there was no question about it: but the answer to the question was exactly the reverse of that which Shattuck gave.

Shattuck further testified upon cross-examination as follows [T. p. 1129]:

"Q. By Mr. M. Martin: I am handing the witness a copy of Exhibit 'W'. Now, directing your attention to paragraph 12, where it states: '12: Subject to termination upon the terms hereinafter in this paragraph 12 provided Defense Corporation hereby agrees to sub-lease the site and to lease the facilities and machinery to be acquired hereunder, and does hereby sub-lease the site, and leases the facilities and machinery to be acquired hereunder, to lessee, and lessee does hereby lease and sub-lease the same from Defense Corporation for a term ending December 31, 1947, which term, upon its expiration, shall be automatically extended, subject to similar termination for an additional period ending December 31, 1949.'

Now, is it your understanding that had no condemnation been filed and had no notice been served by either party that upon the expiration of the lease there, the first period, December 31, 1947, that Concrete Ship Constructors could have on the 1st day of January, 1948, elected to purchase? A. No, they certainly could not; not under that.

Q. And is it your understanding that upon the expiration of the term ending December 31, 1949, that the lessee could on January 1, 1950, have elected to purchase? A. No, he could not; not in my opinion."

Further testimony of Shattuck [T. p. 1130] revealed clearly that he felt the Tavares Construction Company had no option to purchase upon the expiration of the lease. Examination of Clause 15 [T. p. 58] reveals that the company had as a matter of fact such an option. That clause provided as follows:

> "Upon the *expiration* or termination of this lease or extension thereof pursuant to paragraph 12 hereof . . . lessee shall have and is hereby granted . . . the right and option . . . to purchase all but not part of the site, facilities and machinery . . ." (Italics ours.)

This testimony was not only misleading to the jury in determining the rights of the Tavares Construction Company at the time of their extinguishment by the taking of the Government, but it clearly revealed that Shattuck was unaware of all of the rights of the Tavares Construction Company at the time that he made his appraisal of the property taken from that company by the Government.

These examples do not exhaust by any means the instances where the Government's witnesses, qualified as "expert appraisers" sought to testify as "expert attorneys" and, in so doing, drew conclusions and made deductions that were plainly in error and as plainly misleading to the jurors.

In addition to the testimony of the Government's witnesses which revealed that they did not know what rights and obligations were created by the Agreement of Lease, the Government counsel in his final argument to the jury attempted to further confuse the jurors by saying [T. p. 1256]:

> "But I say to you that the claim of the Tavares Construction Company in this goes out the window

by virtue of evidence which you can see, which you can feel, and which will stand out before you like the tall pines in the forest of truth. Every claim that it has in this lawsuit stems from Exhibit W. I say to you that, in reading that document, if you can tell me what it means, then you are probably a better man than I am. I tell you that, if the lawyers can agree on what that document means, they are better lawyers than I am. So, therefore, their rights stemming from Plancor 407 are what you are to determine."

This argument by Government counsel would appear to be the argument of one "seeking to take advantage of his own wrong." Attorneys for the Government drafted Plancor 407 (the Agreement of Lease). They inserted all of its clauses. They were the ones who made its language clear or unclear. Despite that fact, the Government in the trial below argued that the jury should give to the Travares Construction Company nothing because no one, not even lawyers, could agree as to what that document means. If the Agreement of Lease was, as a matter of fact, unclear, the responsibility for that lack of clarity rests with the Government and it should not in this case argue, nor be heard to argue, that the Travares Construction Company therefore has no rights under the lease.

As a matter of fact, the Agreement of Lease does have a definite meaning. That lease is complex, it is true, but we deny that it is meaningless. We submit that that complexity disappears upon careful analysis, and that, had this condemnation not intervened, no problem of construction would ever have arisen.

In light of the errors which the Government witnesses made—and naturally so—in their construction of the

agreement in question, and in light of the argument of Government counsel, based upon the testimony of the Government witnesses, that the lease was without meaning, we submit that it was clearly reversible error for the court not to have instructed the jury in detail as to the legal rights of the Tavares Construction Company under the Agreement of Lease rather than to have permitted the jurors to arrive unaided at their own construction of that complex and technical contract.

VI.

The Evidence Is Insufficient to Support the Verdict and Judgment.

The Government called two expert witnesses as to values, Charles B. Shattuck and Tom Mason, each of whom expressed the opinion that the Tavares Construction Company's interests had a market value of nothing [Tr. pp. 1116 and 1175]. Both of these opinions were based upon erroneous premises, and were therefore unworthy of consideration.

Mr. Shattuck understood that Tavares Construction Company was there merely at the will of the Government and that all of Tavares Construction Company's rights could be cancelled out at any time by the Government [T. pp. 1113 and 1126 to 1135]. He understood that this condemnation action was actually an election by the Government to cancel out all of Tavares Construction Company's rights, which cancelled the lease and the option and as a result thereof Tavares Construction Company had no rights to be compensated for in this action [T. p. 1135].

Mr. Mason based his opinion as to no value upon his opinion that the lease was too speculative because of the

many ifs, ands, and possibilities of this and that happening such as the right to remain on the property and to the option being cut off by condemnation, upon his knowledge of what happened after the last war to another shipyard realizing that we were out of war at the momment (thereby basing his appraisal on 1947 conditions instead of 1944 conditions), and because it was questionable as to whether Tavares Construction Company could obtain the consent to an assignment, all of which would throw up a question as to whether it would be a piece of paper that you could market [T. pp. 1200, 1202].

Appellants called four expert witnesses as to values of the leasehold estate of Tavares Construction Company. The opinions of these witnesses were: H. G. Hotchkiss $600,000 [T. p. 802], Henry Phillip Anewalt $500,000 [T. p. 831], Roy F. Bleifuss $573,000 [T. p. 869] and Edwin A. Mueller $500,000 [T. p. 881].

Three of these same witnesses testified as to values on behalf of the defendant City of National City. Their opinions as to values of the National City Tidelands were: Anewalt $630,615 [T. p. 536], Hotchkiss $655,474 [T. p. 554], and Mueller $617,900 [T. p. 589]. The jury believed these witnesses as evidenced by their verdict of $650,000 for National City [T. p. 1304].

Certainly the jury didn't believe these same witnesses 100% as to National City and disbelieve them 100% as to Tavares Construction Company. Obviously the jury followed the Court's final instruction that their verdict will be zero if they found that the lease could not be sold [T. p. 1301]. Obviously the jury read paragraph Twenty-four of the lease [T. p. 64] which prohibited the sale of

the lease without the consent of Defense Plant Corporation and which was so emphatically called to their attention by counsel for the Government [T. p. 1262], and there being no evidence of such consent having been given, unquestionably believed that they had no alternative under the Court's final instruction but to bring in a verdict of zero.

In this connection it is to be noted that National City was prohibited by law [Art. 15, Sec. 3 of California Constitution; Calif. Stat. 1923 Chap. 46, Sec. 3; T. pp. 1207-1209] from selling its tidelands taken by these proceedings, yet the Court did not instruct the jury that if they found that National City's tidelands could not be sold that then their verdict for National City should be zero.

Thus two separate property owners rights were submitted at the same time to the same jury for evaluation upon the opinions of the same witnesses. Both owners were prohibited from selling. Yet the Court instructed the jury that if they found that the Tavares Construction Company's lease could not be sold, then their verdict will be zero (1303), but did not give a similar instruction as to National City. Therefore, the jury was free to follow these witnesses' opinions as to values as to National City, but not as to Tavares Construction Company. As a result, their verdict was $650,000 for National City and $0 for Tavares Construction Company [T. pp. 1304, 1305].

We submit that the verdict and judgment are not supported by the evidence but are contrary to the evidence, and that the trial has through error resulted in a gross miscarriage of justice.

VII.

The Verdict and Judgment Are Against Law.

The Constitution requires that just compensation be paid for the taking of appellants' interests that has been accomplished by this proceeding. This means that appellants were entitled to an award of *something*. That has not been accomplished by a verdict and judgment of *nothing*.

An award of nothing could only be upheld on the basis that appellants had no rights whatsoever or that nothing was taken from them by these proceedings.

The Court instructed the jury that if they found that the interest of the Tavares Construction Company and its associates under said instrument of agreement is so speculative and conjectural that no purchaser in the open market would have purchased the same except for a nominal consideration, then their verdict must be in a nominal figure only [T. pp. 1293 and 1301]. But the jury did not award a nominal amount. Instead the jury found that the lease could not be sold and pursuant to the Court's final direction returned a verdict of zero.

Admittedly appellants were in possession of this 100-acre shipyard and engaged in building ships for the Government rent free, when the taking took place. They were there under a valid claim of right recognized as such by the Government. Despite all of the erroneous interpretations placed on appellants' lease by the Government's counsel and witnesses, we submit that that lease in definite

terms gave appellants' certain legal rights, which rights were being enjoyed and had a value. Appellants are entitled to have that value determined, regardless of the fact that they were prohibited by the agreement from selling those rights.

We submit that the verdict and judgment of nothing is contrary to the Fifth Amendment to the Constitution.

Conclusion.

In conclusion we respectfully submit that the normal method of proceeding to determine just compensation in a condemnation case is to first determine the value of the fee simple estate. Second determine the value of the lessee's estate. Third deduct the value of the lesse's estate from the value of the whole estate, and thereby arrive at the value of the lessor's estate.

In the instant case had the jury been instructed to first determine the value of the shipyard, complete with all the facilities and improvements as of December 23, 1944 and then to deduct therefrom the option price at which the lessee was permitted to purchase the shipyard, the jury could readily have determined the value of the purchase option feature of the leasehold estate.

This shows that exclusive of the value of the possessory rights under the lease, the lessee was entitled to receive as just compensation for the taking of its purchase option the difference between the market value of the shipyard and the option price at which lessee could have purchased the complete shipyard including site, facilities

and machinery as of December 23, 1944 or at any time within the option period as specified.

This measure of determining just compensation would produce in dollars the same award as if lessee were suing for damages for breach of its purchase option contract. As the plaintiff was here seeking to acquire, and did acquire by its declaration of taking and the judgment herein, the purchase option for the very purpose of being relieved from plaintiff's obligations as grantor of said option, it is indeed difficult to see why the measure of just compensation in eminent domain should not be the same as the measure of damages for plaintiff's breach of the option contract.

The loss to the lessee is the same and the rule of reason clearly indicates that the measure of recovery as to the option feature of the leasehold estate should be the same.

Such an instruction by the trial court would have been very simple for the jury to understand, and upon the proof made the jury could have returned a verdict on the merits of the case. Under the instructions as given, the jury was not permitted to decide the question of just compensation, and the matter was by the trial court erroneously reserved for future determination either by the Court of Claims or in some other forum.

We respectfully submit that this proceeding should be remanded to the trial court with instructions:

1. To vacate and set aside the judgment herein insofar as the appellants are concerned.

2. To grant the appellants' Motion for a New Trial, and

3. To be governed upon the new trial by the principles of law for determining just compensation as set forth in appellants' brief.

Respectfully submitted,

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